X., TRUSTEE OF THE ESTATE OF Y. DECD. v. COMPTROLLER OF INCOME TAX, STATES OF MALAYA

[F.C. (Azmi L.P., Ong Hock Thye C.J. (Malaya) and MacIntyre F.J.) January 24, 1969]

[K.L. — Federal Court Civil Appeal No. X.62 of 1967]

Income Tax — Charge of — Legacy given expressly for services to be rendered by appellant as trustee — Whether liable to tax as "gains or profits from employment" — Meaning of employment — When income accrues — Whether income had accrued before or after January 1, 1948 — Income Tax Ordinance, 1947, s. 10(1).

In this case by clause 4 of his will the testator directed as follows: "I direct that my trustees shall be entitled to receive a remuneration of 5% in respect of their time and trouble in acting as such trustees such remuneration to be calculated on the gross amount of all assets received by them." The Comptroller of Income Tax claimed that the monies drawn pursuant to this clause by the appellant were, either gains and profits from employment chargeable with tax under section 10 (1)(b) or profits arising from property assessable under section 10(1)(f) of the Income Tax Ordinance, 1947 which came into force on January 1, 1948. The appellant contended that the income was not assessable as, first there was no provision is the Ordinance for taxing the remuneration paid to a trustee by way of gift under a will, and secondly, the remuneration had accrued to him before the Ordinance came into force.

Held: (1) the income earned by a trustee holding a remunerative office is income earned for and in the course of employment as trustee and is chargeable with tax under paragraph (b) of section 10(1) of the Ordinance;

(2) whether the assessments for the years 1949 — 1959 were rightly made could only be determined upon the proper construction of clause 4 of the will and as the matter was not argued the court was unable to give its own interpretation of the clause.

Cases referred to:—

(1) *Dale* v. *Commissioners of Inland Revenue* [1934] A.C. 11; 34 T.C. 468.

(2) *R.* v. *Micklethwait* 11 Ex. 452; 156 E.R. 908.

(3) *Lumsden* v. *Inland Revenue Commissioners* [1914] A.C. 877.

(4) *Davies* v. *Braithwaite* [1931] 2 K.B. 628.

FEDERAL COURT.

G.S. Hill (*K. Raja Nayagam* with him) for the appellant.

Ng Mann Sau, Senior Federal Counsel, (*Nik Saghir* with him) for the respondent.

Cur. Adv. Vult.

Ong Hock Thye C.J. (Malaya): I have had the advantage of reading the judgment in draft of my brother MacIntyre and, with all respect to learned counsel who argued the appellant's case most persuasively, I too have reached the same conclusions.

By clause 4 of the will the appellant was given a legacy conditional upon his acceptance of the office of trustee and at one stage I was inclined to hold that, as such, it was not liable to tax under paragraph (b) of section 10(1) even though the legacy was given expressly for services to be rendered by the appellant as trustee. After careful consideration, however, I do not think that view is tenable, having regard to what Lord Normand said in *Dale's* (1) case.

The decision on this point, nevertheless, does not conclude the whole matter. There remains the appellant's further contention that, even if the payment under clause 4 falls within paragraph (b) of section 10(1), the period for which such payment should be taxable should be the year in which the right to receive payment accrued to the appellant, namely, on the death of the testator in 1941, or the grant of probate in Singapore later in the same year or, at latest, the resealing of the Singapore grant in Kuala Lumpur in 1943. It has been argued that by reason of such right to payment having accrued before enactment of the Income Tax Ordinance 1947, the subsequent withdrawals by the appellant of the moneys so due to him, even after the coming into force of the Ordinance, cannot render them liable to tax since the law is not retrospective.

The respondent objected to this further ground of appeal for the reason that it was raised here for the first time. We decided, however, to hear argument on this ground in the first place, since it would not matter in the event of the appellant succeeding in his first ground of appeal. The further point, of course, now becomes relevant.

We are immediately confronted with the problem that clause 4 has never been authoritatively construed hitherto and indeed, neither from one side nor the other has this or any other court had the benefit of argument from learned counsel as to the true meaning and effect of its provisions. Section 10 of the Income Tax Ordinance speaks of income "accruing" in respect of each year of assessment. The Comptroller of Income Tax has proceeded all along on the assumption that the annual sums charged to tax had accrued during and in respect of each year withdrawals were made by the appellant. That, in my opinion, is a false premise and the fact that the argument so far has turned on the proper interpretation of paragraph (b) of section 10(1) does not alter the fact that tax is chargeable only on income for the year it accrues. I do not think it will be right or proper at this stage for this court to give its own interpretation of clause 4 without having the benefit of hearing argument on both sides. The assets of the estate involved are very considerable and varied and it has been assumed that the appellant had not earned anything before income tax became exigible. If, as was most probably the case, the estate was continuing to receive considerable rents and profits from its properties and businesses carried on as going concerns, between the death of the testator and the imposition of income tax, so much thereof as was earned during that period by the trustees under clause 4 cannot be subject to tax, even if pay-

ment of the debt was deferred. The truth of this proposition is self-evident.

Next, there is the question: how and on what basis should the computation of the trustee's remuneration be made on the proper contruction of clause 4? This question opens up a wide field of inquiry to which no answer is possible at this stage. What, for instance, is the effect of the direction that the remuneration be calculated on the *gross* amount of all assets received by them, that is to say, on the capital value rather than the more common type of remuneration, which is a percentage on income?

This appeal, therefore, provides only a partial answer to the questions raised. The gift, or so much of it, as falls to be charged as trustee remuneration accruing after income tax becomes exigible, is liable to tax under paragraph (b), but not under paragraph (f), of section 10(1) of the Ordinance. Whether the assessments for the years 1949 to 1959 were rightly made remains to be determined upon the proper construction of clause 4.

I would make no order as to costs here and and set aside the order as to costs made in the court below.

MacIntyre F.J.: The appellant is one of the trustees appointed under the will of Y., deceased, who died on May 11, 1941. This appeal concerns the assessment of tax for the years 1949-1959 (hereinafter referred to as the relevant period) in respect of monies drawn by the appellant from the funds of the estate, pursuant to clause 4 of the will which reads:—

"I direct that my trustees shall be entitled to receive a remuneration of 5% in respect of their time and trouble in acting as such trustees such remuneration to be calculated on the gross amount of all assets received by them."

The respondent claims that the monies drawn pursuant to this clause for the relevant period are either gains and profits from employment chargeable with tax under section 10(1)(b) or are profits arising from property assessable under section 10(1)(f) of the Income Tax Ordinance, 1947 (hereinafter referred to as the Ordinance) which came into force on January 1, 1948. The appellant, however, in his grounds of appeal, contends that the income which the respondent seeks to tax is not assessable, first, because there is no provision in the Ordinance for taxing the remuneration paid to a trustee by way of a gift made under a will and, secondly, the remuneration, in this case, had accrued to him before the Ordinance came into force. In regard to the latter ground of appeal, the respondent has raised a preliminary objection on the ground that the issue was not raised before the Board of Review and that to admit it now would be tantamount to admitting fresh evidence which was in the possession of the appellant at the inception of the case. Besides, it is contended that the respondent has been deprived of the opportunity of cross-examination or adducing evidence in rebuttal. Since a decision on the preliminary objection would serve no purpose if the appellant succeeded on the first ground of appeal, we decided to hear argument on both grounds, reserving the liberty to consider the preliminary objection, only if, in our opinion, the appeal failed on the first ground.

It would be convenient, at this stage, to refer to the charging section of the Ordinance, the relevant parts of which read as follows:—

Charge of Income Tax

"10. (1) Income tax shall, subject to the provisions of this Ordinance, be payable at the rate or rates specified hereinafter for each year of assessment upon the income of any person accruing in or derived from the States of Malaya or received in the States of Malaya from outside the States of Malaya in respect of —

(a) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised;

(b) gains or profits from any employment;

. . . . . .

(f) rents, royalties premiums and any other profits arising from property.

(2) For the purposes of paragraph (b) of subsection (1) of this section, 'gains or profits from any employment' means —

(a) any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance (other than a subsistence, travelling, conveyance or entertainment allowance which is proved to the satisfaction of the comptroller to have been expended for purposes other than those in respect of which no deduction is allowed under section 15 of this Ordinance) paid or granted in respect of the employment whether in money or otherwise;

. . . . . ."

On behalf of the appellant, it was submitted, first, that only income of the nature specified in one or other of paragraphs (a) to (f) of section 10(1) are chargeable with tax and none other and, therefore, income from any other source should not be taxed. This contention is based on the well-established rules expressed by Parke B. in *Re Micklethwait,*[2] declaring:—

". . . . that the subject is not to be taxed without clear words for that purpose; and also, that every Act of Parliament must be read according to the natural construction of its words."

A similar view was expressed by Viscount Haldane in *Lumsden* v. *Inland Revenue Commissioners* [3] when he said:—

". . . . the duty of judges in construing statutes is to adhere to the literal construction unless the context renders it plain that such a construction cannot be put on the words. This rule is especially important in cases of statutes which impose taxation."

In this connection, we were referred to section 10(1) of the Singapore Income Tax Ordinance Chapter 166, which is in *pari materia* with our section 10(1) in every other respect, except that it carries an additional paragraph which reads:—

"(g) any gains or profits of an income nature not falling within any of the preceding paragraphs."

Similar provisions also exist in the British and Australian income tax legislations. It was contended that the absence of a sweeping-up clause in our Ordinance indicated an intention on the part of the Legislature to exclude from taxation income which does not fall strictly within the four walls of one or other of paragraphs (a) to (f) of section 10(1); secondly, that the disposition under clause 4 of the will is not a gain or profit from any employment chargeable with tax under paragraph (b) of section 10(1) since "employment" in that paragraph envisages an employer-employee relationship; thirdly, that when the Legislature has classified income into different categories for the purpose of taxation, the clauses should not be construed as overlapping, i.e. to say, one source of income falling under two or more clauses. On that principle, it was contended that, even if the remuneration provided under clause 4 is gain or profit arising from employment under paragraph (b), it cannot, at the same time, as claimed by the respondent, be regarded as also falling under paragraph (f); and, lastly, that the disposition under clause 4, being a legacy, must be deemed to have vested in the appellant as executor at the time of the death of the deceased in May, 1941, or accrued to him as legatee at the end of the executor's year in 1942. As for the preliminary objection, it was contended that the facts relevant for the determination of the issue are to be found in the record itself, namely, the date of the death of the deceased and the terms of clause 4 of the will.

In regard to the absence of a sweeping-up clause, the argument, in my opinion, amounts to a contention that the sources of income specified in paragraphs (a) to (f) of section 10(1) are not exhaustive. This, however, was not the opinion of the Legislature, when it passed the Bill, as evidenced by the following passage in the objects and reasons for the Bill published in the *Malayan Union Gazette* of November 12, 1947, which reads:—

"The sources of income specified in clause 10 are exhaustive".

However, it is clear from the authorities that, if the meanings of words and phrases in a statute are clear by themselves, they should be given their ordinary or natural meaning irrespective of consequences. The point taken before us is that the words "any employment" in paragraph (b) of section 10(1), immediately following the phrase "gains or profits from" refer to employment in which an employer-employee relationship subsists. The reason for this view appears to be that if the meaning of the word "employment" is extended to include self-employment in an occupation of profit, then paragraph (a) of section 10(1) would be rendered redundant, as income from any self-employment would include gains and profits from any trade, business, profession or vocation. It was further contended that even if income from self-employment falls within paragraph (b), trusteeship is not an employment but an office.

It was not argued that there is anything in paragraph (b) itself to suggest that the words "any employment" meant employment in which an employer-employee relationship subsists. It was argued that the word "employment" in paragraph (b) should be given the restricted meaning as hereinbefore suggested as otherwise it would offend against the rule that each clause in a charging section of a Finance Act should be regarded as mutually exclusive. It was sought to strengthen this argument by referring to English decisions in which the meaning of the word "employment" under English statutes has been assigned restricted meanings in accordance with the context.

In *Dale* v. *Commissioners of Inland Revenue*,[1] the question arose whether remuneration paid to a trustee by way of an annuity under the terms of a will was earned income or investment income. If the latter, the taxpayer had to pay a special tax. Section 49(1) of the Finance Act of 1948 reads:—

". . . . the expression 'investment income' means income from any source other than a source of earned income."

"Earned income" is defined by section 14(3) of the Income Tax Act, 1918, which reads:—

"For the purposes of this section the expression 'earned income' means — (a) any income arising in respect of any remuneration from any office or employment of profit held by the individual . . . ."

This case was cited to us not only in support of the argument that a trustee who receives an annuity under a will for acting as such holds an office of profit and not an employment of profit, but to draw our attention to an *obiter* observation made by Lord Normand in his judgment which reads as follows:—

". . . . It is not contended that it is income from an 'employment of profit', for that contention would encounter the difficulty discussed in several of the reported cases that there is no employer."

It is clear that this observation does not carry the matter any further than saying that the question of whether, under the English income tax law, "employment" implies an employer-employee relationship, presents some difficulty.

In *Davies* v. *Braithwaite*,[4] the meaning of the expression "employment" was considered. In that case, the income of an actress arising partly from professional performances and partly under contract was assessed for income tax under Schedule D of the English Income Tax Act, 1918 or, in the alternative, under Schedule E. The question was under what schedule she should be taxed. The decision in

that case is not relevant to the instant case but what is relevant is the meaning assigned to the expression "employment" in the respective schedules. The relevant part of Schedule D reads:—

"(1). Sch. D. 1. Tax under this Schedule shall be charged in respect of: (a) The annual profits or gains arising or accruing . . . . (ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere; . . . ."

The rule on Schedule E reads:—

"1. Tax under this schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this schedule . . . in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment, except as otherwise provided . . . ."

Rowlatt J. held:—

"When the word 'employment' is used in connection with a profession or vocation in Schedule D it means the way in which a man employs himself. But 'employment' in Schedule E means something different. In that schedule it means something analogous to an office and which is conveniently amenable to the scheme of taxation which is applied to offices as opposed to the earnings of a man who follows a profession or vocation."

So it would seem that the expression "employment" could mean either the way in which a man employs himself or the holding of a remunerated office, depending upon the context in which the word is used. Paragraph (b) of section 10(1) refers to "any employment" and, if the intention of the Legislature is to tax every possible source of income, then the expression "any employment" must be assumed to include employment in a remunerated office whether there be an employer or not. It is totally irrelevant and immaterial whether the remuneration is a legacy or not. As said by Lord Normand in *Dale* v. *Commissioners of Inland Revenue, supra*:—

". . . . the question whether income is earned or not is a question which arises between the trustee and the Inland Revenue, and it has no relation either to the legal duty which a trustee owes to the trust and the beneficiaries, or to the legal conception that such a payment as that under consideration derives from a testator and can be regarded as a legacy. The source of the sum and its character as a receipt in the hands of the trustee are two separate and unconnected things."

It is true that the exercise of the functions or duties of an executor or trustee is not a trade, business, profession or vocation and any income from that source cannot fall under paragraph (a). But I cannot see any objection to holding that the income earned by a trustee holding a remunerated office is income earned for and in the course of employment as trustee. Since the disposition under clause 4 of the will is in the nature of a fee or allowance for the performance of duties as executor, it falls within the meaning of "gains or profits from any employment", as defined in section 10(2) of the Ordinance.

As for the respondent's contention that the property disposed under clause 4 of the will is also assessable as income under paragraph (f) of section 10(1), I reject that contention on the ground that the disposition under clause 4 is not rent, profit, premium or profit arising from the taxpayer's property. It is an outright grant from the deceased's estate.

In the result, the appeal fails on the first ground. It, therefore, becomes necessary to consider the preliminary objection to the second ground of appeal. This ground raises the question whether the assessment is legal or illegal. It is a question which the court is bound to take judicial notice of, whether raised on appeal or not, for it cannot ignore a fundamental right preserved by article 13(1) of the Constitution, namely, that:—

"No person shall be deprived of property save in accordance with law"

In order to decide this issue, it is necessary to construe the meaning, in clause 4 of the will, of the phrase:—

"Such remuneration to be calculated on the gross amount of all assets received by them."

The significant word is "received". What does that mean? Are the words "received by them" to be given the same meaning as "vested in them" as trustees? It would be, in my opinion, indefensible to construe clause 4 of the will without reading the whole of the will. The will was not produced in evidence.

There is no evidence on the record as to whether the income on which assessment was made had accrued before or after January 1, 1948. Another question which has to be resolved is whether or not, under the terms of the will, the trustee's remuneration is recover able *pro tanto* while the trusts under the will are executory, whether payments may properly be collected or received in advance or whether they could only be claimed in arrears or whether they accrue from day to day or according to an annual accounting period.

For the reasons abovestated, I would set aside the tax assessment as well as the order for costs made in the court below and make no order as to costs here. Pursuant to the judgment of this court, the respondent will have to take such steps as he may be advised.

Azmi L.P. concurred.

Order accordingly.

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